

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

KEVIN O. GUNN,

Petitioner,

v.

J. F. SALAZAR, Warden,

Respondent.

Civil No. 08-0972 LAB (WMc)

**ORDER REQUIRING RESPONSE TO
PETITION (28 U.S.C. § 2254)**

On May 27, 2008, Petitioner, a state prisoner proceeding pro se, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. [Doc. No. 1.] This Court dismissed the Petition without prejudice on June 10, 2008, for Petitioner's failure to either pay the filing fee or move to proceed in forma pauperis, and for Petitioner's failure to allege exhaustion as to claim six. [Doc. No. 3.] On June 23, 2008, Petitioner filed a First Amended Petition along with an Application to Proceed In Forma Pauperis. [Docs. No. 4, 5.]

Petitioner's Application to Proceed In Forma Pauperis has been granted, and Petitioner states in his First Amended Petition that claim six has been exhausted, as it was raised in a writ of habeas corpus filed in the California Supreme Court, which was subsequently denied. [First Amended Petition at 6.] In light of the above, and in accordance with Rule 4 of the rules governing petitions for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, **IT IS ORDERED** that:

1 1. The Clerk of this Court shall promptly (a) serve a copy of the Petition and a copy of
2 this Order on the Attorney General for the State of California, or his authorized agent; and
3 (b) serve a copy of this Order on Petitioner.

4 2. If Respondent contends the Petition can be decided without the Court's reaching the
5 merits of Petitioner's claims (e.g., because Respondent contends Petitioner has failed to exhaust
6 any state remedies as to any ground for relief alleged in the Petition, or that the Petition is barred
7 by the statute of limitations, or that the Petition is subject to dismissal under Rule 9 of the Rules
8 Governing § 2254 Cases, or that all of the claims are procedurally defaulted, or that Petitioner
9 is not in custody), Respondent shall file a motion to dismiss pursuant to Rule 4 of the Rules
10 Governing § 2254 Cases no later than **August 11, 2008**. The motion to dismiss shall not address
11 the merits of Petitioner's claims, but rather shall address all grounds upon which Respondent
12 contends dismissal without reaching the merits of Petitioner's claims is warranted.¹ At the time
13 the motion to dismiss is filed, Respondent shall lodge with the Court all records bearing on
14 Respondent's contention in this regard. A hearing date is not required for the motion to dismiss.

15 3. If Respondent files a motion to dismiss, Petitioner shall file his opposition, if any, to
16 the motion no later than **September 10, 2008**. At the time the opposition is filed, Petitioner shall
17 lodge with the Court any records not lodged by Respondent which Petitioner believes may be
18 relevant to the Court's determination of the motion.

19 4. Unless the Court orders otherwise, Respondent shall not file a reply to Petitioner's
20 opposition to a motion to dismiss. If the motion is denied, the Court will afford Respondent
21 adequate time to respond to Petitioner's claims on the merits.

22 5. If Respondent does not contend that the Petition can be decided without the Court
23 reaching the merits of Petitioner's claims, Respondent shall file and serve an answer to the
24 Petition, and a memorandum of points and authorities in support of such answer, pursuant to
25 Rule 5 of the Rules Governing § 2254 Cases no later than **August 26, 2008**. At the time the
26 answer is filed, Respondent shall lodge with the Court all records bearing on the merits of
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28 ¹ If Respondent contends Petitioner has failed to exhaust any state remedies as to any ground for relief alleged in the Petition, the motion to dismiss shall also specify the state remedies still available to Petitioner.

1 Petitioner's claims. The lodgments shall be accompanied by a notice of lodgment which shall
2 be captioned "**Notice of Lodgment in 28 U.S.C. § 2254 Habeas Corpus Case — To Be Sent**
3 **to Clerk's Office.**" Respondent shall not combine separate pleadings, orders or other items into
4 a combined lodgment entry. Each item shall be numbered separately and sequentially.

5 6. Petitioner may file a traverse to matters raised in the answer no later than **September**
6 **25, 2008.** Any traverse by Petitioner (a) shall state whether Petitioner admits or denies each
7 allegation of fact contained in the answer; (b) shall be limited to facts or arguments responsive
8 to matters raised in the answer; and (c) shall not raise new grounds for relief that were not
9 asserted in the Petition. Grounds for relief withheld until the traverse will not be considered.
10 No traverse shall exceed ten (10) pages in length absent advance leave of Court for good cause
11 shown.

12 7. A request by a party for an extension of time within which to file any of the pleadings
13 required by this Order should be made in advance of the due date of the pleading, and the Court
14 will grant such a request only upon a showing of good cause. Any such request shall be
15 accompanied by a declaration under penalty of perjury explaining why an extension of time is
16 necessary.

17 8. Unless otherwise ordered by the Court, this case shall be deemed submitted on the day
18 following the date Petitioner's opposition to a motion to dismiss and/or his traverse is due.

19 9. Every document delivered to the Court must include a certificate of service attesting
20 that a copy of such document was served on opposing counsel (or on the opposing party, if such
21 party is not represented by counsel). Any document delivered to the Court without a certificate
22 of service will be returned to the submitting party and will be disregarded by the Court.

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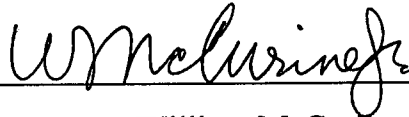
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1 10. Petitioner shall immediately notify the Court and counsel for Respondent of any
2 change of Petitioner's address. If Petitioner fails to keep the Court informed of where Petitioner
3 may be contacted, this action will be subject to dismissal for failure to prosecute.

4 **IT IS SO ORDERED.**

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6 DATED: _____

6/26/08



William McCurine, Jr.

United States Magistrate Judge